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Civil Society Submission on Investment

We send this submission to communicate to you the importance we attach to an investment chapter with high standards of investment protection and liberalization of barriers to investment within the Free Trade Area of the Americas (FTAA) negotiations.

We were heartened to see the role that was assigned to investment issues in the FTAA mandate outlined at the Santiago Summit by the Presidents of 34 Western Hemisphere democracies. By directing the negotiating group on investment to "establish a fair-and transparent legal framework to promote investment through the creation of a stable and predictable environment that protects the investor, his investment and related flows, without creating obstacles to investments from outside the hemisphere" the presidents established a powerful guiding objective for the negotiations.

Protecting investment and opening markets to foreign investment serves to stimulate economic growth and development. Countries actively court foreign direct investment because it brings tangible benefits, such as advanced technology, and improves management techniques. Where investment is intense, there tends to be higher labor productivity and higher wages. For the home country, investment abroad helps them remain competitive in foreign markets and stimulates exports of goods and intermediary products that otherwise would not have taken place.

In considering investment decisions, businesses face numerous choices on where to invest and how to allocate their resources. These decisions reflect the necessities of the market as well as the investment climate as manifested in the rules and practices of the host country.

The FTAA Negotiating Group on investment has a unique opportunity to establish rules on investment to create a level playing field that will allow firms to compete on the basis of their best offerings rather than political considerations. The rules should seek the highest standards now found in bilateral and regional agreements in FTAA countries. They should be transparent and highly accessible to investors. The rules should include:

- > a broad definition of investment to cover the multitude of ways in which investors seek to access markets
- > the right of establishment
- > national treatment
- > a ban on performance requirements
- > the ability to transfer profits and capital in hard currencies without government restrictions, save for serious balance of payments considerations
- > protection against expropriation in accordance with international law standards
- > investor-to-state, as well as state-to-state dispute settlement procedures.

With few well-defined exceptions the rules should be applicable to all sectors of the economy and uniformly applied.

An investment chapter that meets these standards, and which over time provides for the liberalization of investment restrictions, will codify the practices that many countries have already taken on their own and provide for a stable and predictable investment regime in the region.

Recently, objections to investment agreements have been raised on the grounds that they can accelerate a "race to the bottom" with regard to labor standards and protection of the environment. We do not agree. OECD studies point to the fact that investment, growth and development are not inimical to labor and environment objectives. Indeed, countries that practice good growth policies generally have good labor and environment standards. Consequently, we do not believe that investment agreements should be used as vehicles to enforce labor or environmental standards of other countries. Investment, however, should not be used as an excuse for countries to lower standards to attract an investment.

Some critics of investment agreements allege that such agreements may impede the right of authorities to regulate the health, safety and environmental well being of its citizens. We disagree. The issue has gained notoriety in the aftermath of the Ethyl case, in which the Government of Canada settled a complaint with the Ethyl Corporation under the provisions of Chapter 11 of the North American Free Trade Agreement. It is important to note that the regulations in question that were challenged by Ethyl were found to be illegal in a domestic proceeding under Canadian law. Ethyl's challenge could hardly, therefore, constitute an interference with Canada's legitimate exercise of environmental regulation.

Further, to help remove any doubt about a country's right to regulate, negotiators could draw on NAFTA Article 1114 which states "nothing [in this chapter protecting investments] prevents a Party from enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." For greater clarity and certainty, we believe FTAA provisions on this subject should note that such "measures" should be based on sound, scientific evidence.

Foreign investment is the key to growth and development in the hemisphere for the 21st century. Many countries in the region are already liberalizing their investment regimes. Others should be encouraged to do so. The investment chapter of the FTAA should define clear and binding rules of investment that provide transparency and fairness. In this way, the region as a whole can enhance its competitive position to attract investment, and businesses can expand their areas of operations and facilitate economic development and growth.